Supreme Court, U.S.
FILED
OCT 15 1996
OFFICE OF THE CLERK

No. 96-382

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

TERRY P. POWERS,
Next Friend of Hillary Ann Powers; *et al.*,
Petitioners,

v.

BAYLINER MARINE CORPORATION,
a Delaware Corporation;
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION

GEORGE J. KOELZER
Counsel of Record
CAROLYN J. SHIELDS
KENNETH W. LORD
LANE POWELL SPEARS
LUBERSKY LLP
333 South Hope Street
Suite 2400
Los Angeles, California 90071
(213) 680-1010
Attorneys for Respondent
Bayliner Marine Corporation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

10pp

TABLE OF CONTENTS

	Page
JURISDICTION	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	2
REASONS WHY THE PETITION SHOULD BE DENIED	3
I. AS PROVIDED IN RULE 10 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES, A PETITION FOR A WRIT OF CERTIORARI WILL BE GRANTED ONLY FOR COMPELLING REASONS, SUCH AS TO RESOLVE ISSUES OF CONSTITUTIONAL LAW OR DISPUTES BETWEEN CIRCUITS, AND NOT TO REVIEW FINDINGS OF FACT OR AN ALLEGED MISAPPLICATION OF LAW	3
CONCLUSION	7

TABLE OF AUTHORITIES

CASES Page

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 6
Gravier Mfg. Co. v. Linde Co., 336 U.S. 271 (1949) .. 6
Houston Oil Co. v. Goodrich, 245 U.S. 440 (1918) .. 5
Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 4
Magnum Co. v. Coty, 262 U.S. 159 (1923) 5
Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 (1960) 6
NLRB v. Hendricks County Rural Electric Corp., 454 U.S. 170 (1981) 5
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 5
Rudolph v. United States, 370 U.S. 269 (1962) 5
Sentilles v. Inter-Caribbean Corp., 361 U.S. 107 (1959) 6
Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508 (1924) 5
United States v. Johnson, 268 U.S. 220 (1925) 5
Wilkerson v. McCarthy, 336 U.S. 53 (1949) 6

STATUTES

28 U.S.C. § 1253 1
28 U.S.C. § 1254 1

RULES

Federal Rules of Civil Procedure
50(b) 2
59 2
Rules of the United States Supreme Court
Rule 10 ..... 3, 4, 5

OTHER

Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 184 (7th ed. 1993) 5, 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-382

TERRY P. POWERS,
Next Friend of Hillary Ann Powers; *et al.*,
Petitioners,

v.

BAYLINER MARINE CORPORATION,
a Delaware Corporation;
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION

JURISDICTION

Petitioners assert jurisdiction in this matter pursuant to 28 U.S.C. § 1253. 28 U.S.C. § 1253, however, provides for the appellate jurisdiction of the Supreme Court over decisions from three-judge District Courts, and has no bearing on a Writ of Certiorari. See 28 U.S.C. § 1253. This Court's certiorari jurisdiction may only be based on 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioners Terry P. Powers, et al. (hereinafter "Petitioners"), brought this maritime personal injury and wrongful death action in the United States District Court for the Western District of Michigan. Answering special interrogatories, the jury in that action found that Respondent Bayliner Marine Corporation (hereinafter "Respondent") had not acted negligently, and had not manufactured a defective product.[1] Accordingly, judgment was entered for Respondent. Thereafter, Petitioners moved for judgment after trial, pursuant to Fed. R. Civ. P. 50(b), and, in the alternative, for new trial, pursuant to Fed. R. Civ. P. 59. The District Court denied both motions.

In their subsequent appeal to the Sixth Circuit Court of Appeals, Petitioners again raised the issue of product defect. Petitioners did not allege any error in the instructions given to the jury, nor did they allege irregularity in the special verdicts rendered. Urging the Court of Appeals to reverse the trial court purely on the strength of their evidence, Petitioners claimed that the jury's verdict was against the weight of the evidence, and that they were therefore entitled to judgment as a matter of law.

The Sixth Circuit affirmed the District Court, finding no error in the District Court's decision.

SUMMARY OF THE ARGUMENT

Petitioners seek review in the Supreme Court of what is, in essence, the same issue presented to the Court of Appeals. It is undisputed that Petitioners' grievances have been fully addressed by a competent jury, by the District Court, and by the Sixth Circuit Court of Appeals. No further review of the factual and evidentiary disputes which Petitioners raise is either necessary or appropriate. Not

---

[1] Respondent Bayliner Marine Corporation is a wholly-owned subsidiary of Brunswick Corporation, a publicly traded corporation.

only have Petitioners' arguments received full appellate review, inasmuch as they are factual and evidentiary in nature, they are not even properly before this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. AS PROVIDED IN RULE 10 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES, A PETITION FOR A WRIT OF CERTIORARI WILL BE GRANTED ONLY FOR COMPELLING REASONS, SUCH AS TO RESOLVE ISSUES OF CONSTITUTIONAL LAW OR DISPUTES BETWEEN CIRCUITS, AND NOT TO REVIEW FINDINGS OF FACT OR AN ALLEGED MISAPPLICATION OF LAW

Petitioners assert five separate arguments for the exercise of certiorari jurisdiction by this Court. In substance, however, each of Petitioners' arguments stems from a common allegation of error. As Petitioners state in their Argument A:

> The Trial Court and Court of Appeals Considered Proximate Cause, Comparative Negligence, and "Explanation for How the Water Entered the Boat" Evidence to Assess the Existence of a Product Defect and Negligence.

The four remaining arguments do nothing more than reiterate this allegation. To paraphrase, Petitioners claim that general maritime law does not permit consideration of such evidence, that the District Court's decision conflicts with state and federal law, and that the District Court's decision, and its subsequent affirmance by the Court of Appeals, so far depart from the usual course of judicial proceeding as to call for an exercise of this Court's supervisory power.

The crux of this dispute is whether the District Court properly considered what Petitioners characterize as "evidence of causation and comparative negligence" in determining the existence of a product defect. The Sixth Circuit squarely addressed this point, concluding that

"[t]he evidence relating to plaintiffs' alleged misconduct was not used by the trial court to show comparative fault or proximate cause, but as an alternative explanation for how the water entered the boat." *Powers v. Bayliner Marine Corporation*, 83 F.3d 789, 797 (6th Cir. 1996).

The Sixth Circuit has already explained that the alleged error upon which the entire Petition rests was in fact an erroneous interpretation of the evidence by Petitioners. Respondent respectfully submits that a dispute over the correct interpretation of evidence is simply not a proper subject of Supreme Court review. Further, Petitioners just rehash the exact argument rejected by the Court of Appeals. What Petitioners seek here is nothing more than an additional appellate review of their case. Because this Court is not concerned with the correction of lower court errors, to give Petitioners another "bite at the apple" in this way would not only be improper, but totally inconsistent with the established practice of this Court.

Rule 10 of the Rules of the Supreme Court, setting out this Court's own prescribed guidelines for granting certiorari review, provides:

> *Rule 10. Considerations Governing Review on Certiorari*
>
> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted *only for compelling reasons* . . . [and] is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (Emphasis added.)

Essential to the existence of the Supreme Court's certiorari jurisdiction is that its exercise must be limited to those cases which raise legal issues significant not only to the parties involved, but to the public as a whole. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). The Court "must necessarily confine itself

to [cases] which reflect the more important legal problems within the realm of its jurisdiction . . . [and which are] 'beyond the academic or episodic.'" Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 184 (7th ed. 1993) (citing *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955)). It is axiomatic that certiorari review is not intended "merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923).[2]

Rule 10 provides illustrations of when an issue will be sufficiently important to merit certiorari review. For example, this Court will grant a Petition in a dispute where the rulings of two circuit courts are in conflict, or where a state law is in conflict with federal law. Sup. Ct. R. 10. It has long been the stated position of this Court that issues of fact or evidence, however, are properly the domain of the lower courts and the Courts of Appeals, and not of the Supreme Court. *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 (1981) (a question of fact "does not merit court review"); *United States v. Johnson*, 268 U.S. 220, 227 (1925) (the Court does "not grant a certiorari to review evidence and discuss specific facts"); *Rudolph v. United States*, 370 U.S. 269 (1962); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924); *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1918). In fact, as provided in the Supreme Court Rules, even the misapplication of law will generally be outside the scope of the Court's certiorari jurisdiction. See Sup. Ct. R. 10.

---

[2] In his Sept. 7, 1949 address to the American Bar Association, former Chief Justice Vinson characterized the Court's certiorari jurisdiction in similar terms:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases . . . the petitioner has already received one appellate review of his case . . . . [T]he Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

The issue which Petitioners have asked this Court to review turns on an interpretation of evidence. As such, to exercise certiorari jurisdiction over this matter would be both improper and entirely at odds with the decisions of this Court and the Supreme Court Rules. The issue Petitioners raise, while important to their claim, also carries no jurisprudential weight, and certainly does not represent a conflict between the circuits. No interests beyond those of the parties would be served by a review of this evidentiary question.

Not only does the Petition raise merely a factual, evidentiary issue for review, the exact point was addressed and resolved by the Court of Appeals. As one prominent commentator has noted, "The Court is even less likely to take a case to review a factual issue—or to reverse on such an issue if certiorari is granted for some other reason—where the findings of fact made by the district court receive the concurrence of the court of appeals." Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 189 (7th ed. 1993). As this Court has itself pronounced: "[A] court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Gravier Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).[3]

---

[3] Even in the rare instances where the court does grant certiorari to review questions of fact, such cases have involved the refusal by a lower court to submit particular questions to a jury, and the Supreme Court's resulting interest in preserving the litigants' 7th amendment right to a jury trial, rather than an interest in the issues intrinsic to the case. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959). Many of these cases have centered on FELA violations where Congress' intent to have such disputes resolved by a jury had been frustrated. *Wilkerson v. McCarthy*, 336 U.S. 53, 55 (1949). Factual review was never popular with the entire Court, *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107, 111 (1959) (Stewart, J., concurring); *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 332 (1960) (Harlan, J., dissent-

In light of the appellate review which Petitioners' arguments have already received, as well as this Court's time-honored practice not to hear cases which raise merely questions of fact and evidence, Respondent respectfully opposes the exercise of this Court's certiorari jurisdiction, and requests that the Petition be denied.

CONCLUSION

For the foregoing reasons, Respondent urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

GEORGE J. KOELZER
Counsel of Record
CAROLYN J. SHIELDS
KENNETH W. LORD
LANE POWELL SPEARS
LUBERSKY LLP
333 South Hope Street
Suite 2400
Los Angeles, California 90071
(213) 680-1010
Attorneys for Respondent
Bayliner Marine Corporation

DATED: October 15, 1996

---

ing), and has apparently been all but abandoned in recent years. Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 189 (7th ed. 1993).